

Legal and Regulatory Subgroup—Meeting Three Minutes
October 21, 2020
11:00 AM
Virtual Meeting via Webex
https://www.youtube.com/watch?v=c5aw8Y1Y_T0

Meeting Attendees:

Secretary of Public Safety and Homeland Security Brian Moran
Asst. Secretary of Health and Human Resources Catie Finley, on behalf of Sec. Daniel Carey
Commissioner Jewel Bronaugh (VDACS)
Nate Green (Virginia Association of Commonwealth's Attorneys)
Kristen Howard (State Crime Commission)
Holli Wood (OAG), on behalf of Mark Herring
Ngiste Abebe (Columbia Care)
Annette Kelley (Board of Pharmacy)
Michael Carter, Jr. (VSU Small Farm Outreach Program and farmer)
Colby Ferguson (DMV), on behalf of Commissioner Richard Holcomb
Linda Jackson (Department of Forensic Science)
Richard Boyd (Virginia State Police)
Dr. Sam Caughron (Charlottesville Wellness Center Family Practice)
Jenn Michelle Pedini (Virginia NORML)
John Daniel, on behalf of Travis Hill (ABC)

Staff:

Deputy Secretary of Agriculture and Forestry Brad Copenhaver
Jacquelyn Katuin, Policy Advisor to Secretary Moran

Jenn Michelle Pedini called the meeting to order at 11:00 AM

Approval of August 19, 2020 Minutes

Jenn Michelle Pedini called for a vote to approve the minutes of the subgroup's last meeting on September 14, 2020.

Roll Call Vote: 13 yes, 0 no

Unanimous in favor of approval of minutes

Presentation and General Discussion

Verbal Presentation: George Bishop, Department of Motor Vehicles

Mr. Bishop spoke regarding data on impair driving. He discussed data collection regarding the usage of THC, particularly the crash data that is available. He mentioned that DMV does not collect a lot of data regarding drug use, particularly THC. One reason is that when bloodwork goes to the Department of Forensic Science (for an impaired driving case), if the blood alcohol level (BAC) hits 0.1 or higher, the department does not look any further for drug substances in

the blood as the BAC exceeds the legal limit and this will hold up well as evidence in a court case.

When it comes to crashes or traffic stops that do not involve a fatality, Virginia has very little data about THC. If a law enforcement officer finds a driver who is believed to be impaired, and an on-scene breathalyzer test comes back as zero, then they can call in a Drug Recognition Expert (DRE), who may give probable cause to conduct a blood screen test. This blood screen can detect THC or other drugs in the blood.

There are twenty-two (22) Drug Recognition Experts in Virginia. The DRE program had been dormant for many years and was restarted about three and a half years ago; and there is currently an effort to make it more robust. Virginia is currently limited by the number of DREs on the force and by the fact that they are not geographically dispersed in an ideal way.

All deceased drivers involved in fatal crashes are tested for alcohol and for drugs. Pre-2018 they were only required to test for the first three drugs found. Post 2018 they test for all drugs. Post 2018, he feels that Virginia has good data on drugs / THC found in deceased drivers involved in fatal crashes. However, this may be an incomplete picture as Virginia does not have the statutes to mandate testing of non-deceased drivers involved in fatal crashes. Many states do require drug testing for non-deceased drivers involved in fatal crashes.

In 2018, in fatal crashes, 94 deceased drivers tested positive for some level THC. That year Virginia had over 800 traffic fatalities. One third of these were alcohol related. In 2019, 90 deceased drivers tested positive for some level THC; and so far in 2020 the number is 64 (as of October 1).

A National Governors' Association (NGA) group has been meeting to discuss the issue. We have learned that in Colorado, a certain amount of funding from marijuana revenues have been used to beef up data collection and that state's DRE program. Virginia could look to do the same and could also look at the statutes regarding non-deceased drivers involved in traffic fatalities.

Secretary Moran asked about data available regarding driving under the influence of drugs in general. George Bishop offered that DMV has data related to convictions but not related to citations.

Linda Jackson reiterated that DFS has testing procedures in place that if the BAC is found to be 0.1 or higher, then they don't test further for the presence of other drugs. If they do move on and test for other drugs, then a panel test is used. She also mentioned that because drugs are metabolized differently than alcohol, there is not as good information on set limits that would prove someone to be impaired. Drugs act differently on different people. If a prosecution is to be successful against someone based on drugged driving, the ability for an expert to testify regarding impairment based on behavior is important, rather than relying solely on the concentration data.

George Bishop pulled up data on DUID (drugged driving) conviction data since 2012. Generally, there are 150-175 convictions per year for DUID. This is compared to 18,000- 27,000 DUI convictions per year during this same period.

Brad Copenhaver asked if there was any type of change seen in the data when Virginia reinstituted the DRE program and Mr. Bishop stated that there was an uptick in the drugged driving number in 2018, which was the highest number at 173.

Nate Green asked a question to clarify that in 2018 there were 94 driver fatalities in which THC was found in the driver's blood and that there were only 154 convictions for driving while impaired for drugs in that same year. Mr. Bishop confirmed.

Ngiste Abebe asked about data on polysubstance use for people involved in incidents. Mr. Bishop stated that he could get data for deceased drivers but would hate to speculate.

Jacquelyn Katuin, Policy Advisor to the Secretary of Public Safety and Homeland Security, added that data collection is a big issue and we don't have all the data that we would like to have. It's an issue we are working on with NGA and that Virginia is a little ahead of where other states were when they undertook marijuana legalization.

Secretary Moran provided that we have heard from other states that some have established an amount, or per se limit, for THC and what is considered impairment. He asked for thoughts on this topic.

Linda Jackson stated that from the toxicologists at DSF, there is not a scientifically accepted method for determining impairment based on an established limit. She did note that some localities have done this, regardless. She noted that THC is not metabolized in the same manner as alcohol, with it much easier to predict how alcohol is metabolized in the general population.

Jenn Michelle Pedini noted that in states that have established per se thresholds, that those thresholds were established on the testing capabilities of the state laboratories at the time the laws were passed. Per se limits are not based on any scientific data or agreed upon values.

Linda Jackson noted that our testing detection limit for analyzing THC in blood is lower than the per se limits set in other states and that Virginia should not set a limit based upon our testing capability.

Nathan Green added that if Virginia were to go down the road of using a per se limit, we would essentially be criminalizing driving after consuming marijuana, not necessarily based on impairment. It should be clear that a per se limit does not equate to impairment.

Jenn Michelle Pedini added that THC metabolites can be found in the body up to 30 days post consumption in some people and supported Mr. Green's observation about per se limits for THC in blood.

Linda Jackson noted that per se is based on THC, rather than a THC metabolite.

Secretary Moran asked about diminishment in THC or metabolites in blood over time.

Ngiste Abebe noted that impairment could be associated with a number of factors, including sleep deprivation and use of over the counter medications. She asked if we have any data on non-drug impairment. Nathan Green stated that he could provide anecdotal information as a prosecutor. He stated that toxicological information and police or expert observational testimony could be used as evidence.

He further went on to discuss that it is currently more difficult to prosecute someone for impaired driving solely for marijuana use than it is to prosecute for impaired driving due to alcohol use. He discussed prosecutors currently get a lot of DUI cases resulting for someone being pulled over for another infraction, such as driving with headlights out. The officer subsequently smells alcohol and a breathalyzer test is initiated. If the breath test shows a BAC in excess of 0.1, then this is a pretty straightforward case. Substituting marijuana for alcohol in this situation, the prosecution does become more difficult because you have to demonstrate impairment.

Ngiste Abebe initiated a discussion about public educational campaigns regarding impaired driving. The discussion involved public education as an important component to preventing impaired driving. There was discussion regarding educating about level of tolerance versus educating against driving while intoxicated. Information was shared about federal money used for public education related to alcohol use and driving, but there is no federal money given for drugged driving education.

Brad Copenhaver moved the discussion to other topics. These topics included:

- Regulatory Structure
- Banking
- Social Equity
- Local Control / Local Input
- Product Issues / Composition
- Product Testing
- Personal Cultivation

Jenn Michelle Pedini expressed her view that creating a state agency specific to cannabis is important to providing regulatory oversight for all cannabis products consumed by humans. Mr. Copenhaver asked for thoughts about creating a new agency or using existing agencies as a starting point. Michael Carter voiced his opinion that a new agency should be created from the ground up; taking pieces from other regulatory agencies and Jenn Michelle agreed. Jewel Bronaugh stated that newly formed structure might help parties work together more effectively. Brad Copenhaver asked about the value of relying upon the expertise in existing agencies and Dr. Bronaugh stated that there is valuable expertise in existing agencies but that we may need to increase the capacity at existing agencies to deal with this new product. Mr. Carter noted the uniqueness for marijuana from a regulatory standpoint. Ngiste Abebe noted that having a regulator with the authority to use a regulatory process that moves quickly enough to support the industry would be important.

Jason Powell asked a question in the chat box about what entity might be responsible for tax collection in this industry. The current medical marijuana product is not taxed.

Dr. Sam Caughron stated that the structure of the regulator must be well thought out; with that regulator being well funded and with the proper expertise and management skills. It probably needs to be a single agency, without stripping staff from existing agencies.

Brad Copenhaver asked John Daniel from ABC to make a few comments. Mr. Daniel discussed ABS's experience and expertise related to alcohol in regulatory development, law enforcement, tax collection, licensing and all support systems. ABC does have strong background and history with alcohol regulation and oversight. ABC will provide organizational charts for consideration and use as a resource.

Brad Copenhaver discussed the importance of exploring avenues to allow for banking options. Jenn Michelle Pedini noted that she had information from other states to share as resource material.

The group discussed social and economic equity including access to capital, how to handle criminal records, restoration of rights, and a regulatory scheme that affects barriers to entry. Jenn Michelle Pedini mentioned that it is critical to break social justice into two parts: First, undoing historic harms of criminalization and providing expungement
Second, industry structure and economic opportunity

Ngiste Abebe also discussed community reinvestment funds and the timeliness for an expungement process. Virginia is not a state that has true expungement yet, related to marijuana crimes. Mr. Carter mentioned making a social equity program and community reinvestment.

The group discussed the expungement process in Virginia. It was noted that Virginia is still a state that does not have true expungement for previous marijuana crimes. Catie Finley noted monitoring equity and access with a disparity report, similar to Illinois, and using this as a tool to make adjustments.

Jenn Michelle Pedini mentioned possibility of looking at the Crime Commission report regarding expungement. Michael Carter added the possibly of making a social equity program and community re-investment funded from specific portion of revenues generated. Mr. Carter also mentioned social equity in who the state hires as regulators as well.

The subcommittee discussed local input in decision making. Every locality is different and has different goals. Local input may be applied to the location or zoning of businesses. Some states have done an opt-in / opt-out system. Some have local revenue sharing. There was discussion about opt-in / opt-out on alcohol in Virginia.

The group discussed the regulating the composition of product. Issues include the type of products, potency, safety measures, and adulterants. From the consumer safety standpoint for edibles, Jenn Michelle Pedini mentioned serving size and how many milligrams may be

dispensed in one purchase. She mentioned industry standards currently in use around the country. Ngiste Abebe provided input regarding vape products, potency, and metered dosing. Linda Jackson brought up the issue of tamper resistant or tamper evident packaging. There was discussion about counterfeit vape products and ways to deter illicit product. There was discussion about product labeling. Catie Finley discussed having a mechanism for addressing marketing to children.

Public Comment

Elly Tucker- Thanked the group for taking public comment. Ms. Tucker discussed her experience with anxiety and the effectiveness of medical cannabis for treating this condition. She also thanked the group for discussing the issue of impaired driving as they consider the topic.

Paul McLean- Has an interest in preventing contaminated product due to health concerns. He also mentioned the problem with counterfeit products and the role of educating the public to look out for counterfeit product. He discussed testing services for personal cultivators.

Meghan Dolecki- Discussed her experience as a medical cannabis patient. Following head trauma, she was prescribed a combination medications that caused her to suffer ill effects from pseudo-dementia. She has successfully used microdosing of cannabis to get off traditional medication and deal with the head trauma related symptoms.

The meeting adjourned at 12:55 PM.